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DOCKET NO. 84-1314

In the Supreme Court of the United States

October Term, 1984

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 846,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 970,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1248,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

v.

HAMPTON ROADS SHIPPING ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Docket No. 84-1314

IN THE SUPREME COURT OF THE UNITED STATES

October Term,

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 846, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 970, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1248, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioners,

v.

HAMPTON ROADS SHIPPING ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, the Hampton Roads Shipping Association (HRSA), by counsel, prays that this Court deny the issuance of a writ of certiorari sought by Petitioners and not review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on October 23, 1984.

OPINIONS BELOW

Petitioner has properly cited and included in its Appendix (hereinafter cited as Pet. App.) the decisions of the Court of Appeals for the Fourth Circuit and District Court, and such decision and citations will not be repeated here or attached to Respondent's Appendix (hereinafter cited as Res. App.).

JURISDICTION

Respondent accepts the jurisdictional basis alleged in the Petition for Certiorari, although Respondent does not believe this is a case in which grant of a Writ of Certiorari is appropriate.

STATUTE INVOLVED

Respondent accepts the citation by Petitioners of the statute involved and agrees that this Court's interpretation of the statute under *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), and its progeny is controlling.

STATEMENT OF THE CASE

In early August 1984, Petitioners (hereinafter the ILA or the Union) and its Virginia local unions selectively engaged in a series of work stoppages or strikes in the Hampton Roads area terminals. The work stoppages stemmed from a dispute over the utilization of members of container gangs as drivers. The utilization of members within the gang was the subject of locally negotiated contracts between the ILA and its Virginia locals and the Respondent HRSA and the contracts had been approved by the ILA. The District Court found that since at least 1977 utilization was a local matter, and that the utilization of gang members was different in each of the East and Gulf Ports pursuant to their separate local collective bargaining agreements. The District Court found that the ILA and its locals failed to comply with their local collective bargaining agreements which required them to arbitrate disputes rather than to strike or to engage in work stoppages, and entered a preliminary injunction barring the ILA from such action pending resolution of the dispute pursuant to the procedures under the local collective bargaining agreements.

The ILA appealed to the Court of Appeals for the Fourth Circuit alleging that the dispute was one properly arbitrated pursuant to the ILA Master Contract and before the Management-ILA Emergency Hearing Panel (EHP). The EHP is a

national panel made up of representatives of management and labor who are authorized to attempt to resolve issues involving the master containerization agreement which cannot be resolved on a local basis. The ILA further contended that the EHP had, in fact, previously arbitrated the dispute in question on June 12, 1984, and that accordingly the Union could strike to enforce the "arbitration award" of the EHP in its favor.[1] The Court of Appeals for the Fourth Circuit noted in its opinion that the parties were currently involved in arbitration and judicial proceedings before the EHP, the United States District Court for the Southern District of New York, and in the Court of Appeals for the Second Circuit, and accordingly found that "the district court's order for local arbitration was unnecessary." Pet. App. A at 6. The Court of Appeals, however, upheld the District Court's findings of irreparable injury and public interest, and affirmed the grant of a preliminary injunction noting that:

> As long as the Shipping Association (HRSA) seeks to resolve the dispute through the council in arbitration and judicial proceedings, it is entitled to enforcement of the union's obligation not to strike.

Id. at 6a. The case was remanded to the District Court for modification of its preliminary injunction to bring it in conformity with the Court of Appeals opinion.

The District Court then scheduled the case for a February 25, 1985 trial on whether a permanent injunction would be issued. At the Union's request, *see* Res. App. at 1a, and with the consent of the HRSA, the District Court continued the trial with the stipulation that the matters at issue would be tried or resolved within calendar year 1985. Order of February 6, 1985. Res. App. at 4a. On February 26, 1985 the Union filed a Motion for Leave to Amend and Sumary Judgment in the District Court action. Res. App. at 5a. On February 28, 1985, the Union

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1 The union conceeds that the EHP decision was "not strictly speaking, an arbitration award." Petition for Writ, at 4 fn.5.

consented to holding its motion in abeyance pending proceedings before the Court of Appeals for the Second Circuit. Res. App. at 7a.

Simultaneously with these proceedings, the international Union has been engaged in the arbitration and/or litigation of disputes involving manning and utilization of men within the container gang before the Southern District of New York, the Second Circuit Court of Appeals, the Fifth Circuit Court of Appeals, the EHP and an arbitrator, Mr. Arnold Zack. The Union alleges that all of these actions bear upon, are relevant to, and involve the same issues as those involved in the decision which is before this Court on Petition for grant of a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

1. *The issues involved in this case are not yet ripe for decision by this Court; further decisions and proceedings involving related facts are pending in the Eastern District of Virginia, the Southern District of New York, and in the Second and Fifth Circuit Courts of Appeal.*

The granting of a writ of certiorari is discretionary with this Court and will not be granted when there are considerations of ripeness which, in the Court's view, obviate the need for a decision at this point. *See, e.g., Singleton v. Commissioner,* 439 U.S. 940 (1978) (denial of writ);[2] *Brotherhood of Locomotive*

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2 In *Singleton v. Commissioner,* 439 U.S. 940 (1978), the Court stated:

> Moreover, in allocating the Court's scarce resources, I consider it appropriate to disfavor complicated cases which turn largely on unique facts. A series of decisions by the courts of appeals may well provide more meaningful guidance to the bar than an isolated or premature opinion of this Court. As Mr. Justice Frankfurter reminded us wise adjudication has its own time of ripening.

Firemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) (no certiorari because Circuit Court had remanded issue); *Parker v. Los Angeles County*, 338 U.S. 327 (1949) (no certiorari because of pending state litigation); *Continental Oil Co. v. United States*, 299 U.S. 510 (1936) (dismissal of writ).

It is Respondent's belief that the probability of further decisions from courts and/or arbitration proceedings which are now considering factual situations related to the instant case make the Court's consideration of this Petition premature at this time.[3]

2. *There is no conflict among the Circuits with respect to this case as alleged by the Petitioners; the cases cited by the Petitioners are distinguishable on the facts and/or law and are not inconsistent.*

The Petitioners allege a conflict exists between the decision of the Fifth Circuit Court of Appeals decision in *Sea-Land Services, Inc. v. International Longshoremen's Association*, 625 F.2d 38 (5th Cir. 1980), and the decision of the Fourth Circuit

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3 As of this moment, Respondent is aware of the following judicial proceedings still pending which relate to the issue of manning and utilization of container gang members under the various ILA-association collective bargaining agreements: *West Gulf Maritime Ass'n. v. ILA Deep Sea Local 24*, 751 F.2d 721 (5th Cir. 1985), *petition for reh'g en banc filed*, Jan. 21, 1985; *Hampton Roads Shipping Ass'n. v. ILA*, 597 F.Supp. 709 (E.D. Va. 1984), *aff'd in part, rev'd in part*, 746 F.2d 1018 (4th Cir. 1984), *reh'g denied*, _____F.2d _____ (4th Cir. 1984) (on remand motion to dismiss filed Feb. 26, 1985, motion for hearing on perm. injunction scheduled for Feb. 26, 1985 postponed at ILA request); *ILA v. West Gulf Maritime Ass'n.*, 84 Civ. 9080 LBS (S.D.N.Y. Feb. 19, 1985), *appeals filed*, 85 Civ. 7136 (2nd Cir. filed Mar. 1, 1985); *North Carolina Shipping Ass'n. v. Local 1426, ILA*, No. 84-80-CIV-7 (E.D.N.C. Sept. 21, 1984), *appeal pending*, No. 84-2122 (4th Cir. _____, 1984); *South Carolina Stevedores Ass'n. v. Local 1422, ILA*, No. 84-2007-8 (S.C. Sept. 11, 1984), *appeal pending*, No. 84-2189 (4th Cir. Sept. 27, 1984).

Court of Appeals in the instant case with respect to a Union's right to strike pending judicial consideration of an arbitration proceeding. In fact, no conflict exists between the cases. The courts have applied consistent legal treatment to different factual situations.

The *Sea-Land* decision upheld the right of district courts to issue injunctions precluding work stoppages during the period in which and arbitration award is being judicially challenged. The Court held that:

> [A]bsent express agreement to the contrary . . . a *Boys Market* injunction may continue in force pending judicial enforcement of the subsidiary judicial award.

625 F.2d at 42. However, the *Sea-Land* case refused to extend that finding to a collateral National Labor Relations Board proceeding which concerned statutory, not contractual, duties to arbitrate. *Id.* at 42-43.

The Fourth Circuit's decision in the instant case is a full conformity with the *Sea-Land* decision. Like the situation in *Sea-Land*, "The *Boys Market* 'exception' to Norris-LaGuardia is 'limited by the contours of the agreement between the parties.' " *Sea-Land*, 625 F.2d at 43. In the instant case, the District Court expressly found that the petitioner had a contractural obligation to arbitrate under the local agreement. Pet. App. B at 25a-26a. The Fourth Circuit also held that the contract between the parties justified a *Boys Market* injunction although the Circuit Court felt that local arbitration was unnecessary in view of the parallel arbitration under the master contract. Pet. App. A at 6a. Thus, no real conflict exists between the decisions of the Fourth and Fifth Circuits with respect to the granting of a *Boys Market* injunction.

Similarily, no conflict exists with the Fifth Circuit's decision in *West Gulf Maritime Association v. ILA Deep Sea Local 24*, 751 F.2d 721 (5th Cir. 1985). Pet. App. E at 34a. That case held that under the principle of comity, the injunction that was granted should be vacated and the case remanded for entry of an order

of stay, transfer or dismissal.[4] Pet. App. E at 56a. The Fifth Circuit did not include that a *Boys Market* injunction was improper in such a situation, but only that a decision on issuance of an injunction should be deferred to the Southern District of New York in keeping with the principle of comity. The Fifth Circuit expressly distinguished, and did not find a conflict with the Fourth Circuit's treatment, by noting that the issue of comity did not appear to have been raised in the instant case.[5] Pet. App. E at 56a.

Thus, there is no conflict between the decisions of the Circuits which warrants this Court granting certiorari in this matter.

3. ***The decision of the District Court is an interlocutory decision based on issuance of a preliminary injunction; the Petitioners have voluntarily continued the permanent injunction hearing previously scheduled by the District Court, and Petitioners' remedy, if any, more properly rests with that proceedings.***

As noted above, *supra* at p. 4, the District Court had previously scheduled a hearing on the permanent injunction for

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4 At this point, it appears that the case has not yet been remanded to the Texas District Court and no ultimate resolution of the issue has occurred. A Motion for a Rehearing *en banc* has been filed.

5 The Fourth Circuit was not presented with the comity issue. Even if such issue had been raised, it would not have been an appropriate case for the exercise of comity because the two actions did not arise under the same contract or from the same grievance or charge. The Southern District of New York was asked to enforce an "award" arising from a grievance in Galveston, Texas. The Southern District of Texas was also considering the Galveston grievance under the terms of the West Gulf Maritime Association contract. In the instant case, the Virginia District Court expressly found that the HRSA was never "charged" with a grievance under the Master Contract. Pet. App. B at 20-21a. The Fourth Circuit did not address that finding, and accordingly, the District Court's finding remains in effect. Comity will not lie when the respective courts are considering different cases.

February 25, 1985. At that time, Petitioners could have presented any evidence in support of their case to vacate the injunction. Instead, Petitioners chose to request that the matter be postponed. *See* letter from Thomas W. Gleason to Hon. Robert G. Doumar (Jan. 3, 1985); Res. App. at 1a. The District Court agreed to this request by its Order of February 6, 1985. Res. App. at 4a. Subsequently, Petitioners filed a Motion for Leave to Amend and Summary Judgment dated February 26, 1985. Res. App. at 5a. The Petitioners then requested the Motion be held in abeyance pending further judicial resolutions. Res. App. at 7a. In light of the probability of further action at the district court level, this Court may well wish to deny certiorari at this time pending further local developments. Under the terms of the District Court's continuance Order, Res. App. at 4a, further developments are anticipated before this case would be expected to come before this Court on the merits should a writ be granted.

4. ***This case does not involve important questions of national law and policy, but is a factual dispute which follows prior decisions of this Court concerning the jurisdiction of federal courts to issue labor injunctions.***

The Petitioners allege that this case involves important questions of national law and policy. As noted throughout this brief, we believe that the Fourth Circuit has consistently followed this Court's decision in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), and it progeny. What is in dispute are the factual finding of the lower courts with respect to the terms of certain local and national collective bargaining agreements and whether enforceable arbitration awards exist which give rise to or preclude to issuance of *Boys Market* labor injunctions. There is no dispute as to the applicable law.

Similarily, the Petitioners' allegations that this Court's decision is necessary to preserve uniformity in every ILA port is unfounded. The ILA and its locals have chosen to enter into different local collective bargaining agreements in every port area, *see* Pet. App. B at 23a, and the "uniformity" which they wish to preserve in various jurisdictions has never existed.

Should the ILA wish such uniformity, its proper vehicle is to resort to the bargaining table and the local collective bargaining agreements.

CONCLUSION

For the foregoing reasons, Respondent prays that this Court deny Petitioners' request for writ of certiorari in this matter.

Dated: March 13, 1985

Respectfully submitted,

VANDEVENTER, BLACK, MEREDITH & MARTIN
500 World Trade Center
Norfolk, Virginia 23510
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Of Counsel:

DANIEL R. WECKSTEIN
BRADEN VANDEVENTER

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APPENDIX A
LETTER FROM THOMAS W. GLEASON

January 3, 1985

Hon. Robert G. Doumar
United States District Judge
United States District Court
Eastern District of Virginia, Norfolk Division
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Re: Hampton Roads Shipping Association v.
International Longshoremen's Association
Civil Action No. 84-500-N

Dear Judge Doumar:

We are writing at this time to advise Your Honor of certain developments in the above case which have occurred since the granting of the preliminary injunction and also to request that, in light of these developments, Your Honor postpone the pretrial conference presently scheduled for February 1, 1985.

On August 29, 1984 Judge Sand of the United States District Court for the Southern District of New York denied ILA's petition to confirm the Emergency Hearing Panel award. Judge Sand remanded the case to the EHP, to consider the effect of the "abstention" by a management member of the Panel at the time that the EHP members voted on the "18 and 2" grievance on June 12, 1984. A copy of Judge Sand's opinion, issued October 4, 1984 is enclosed. We also note that the Council of North Atlantic Shipping Associations intervened in the action before Judge Sand prior to the issuance of his decision and that Hampton Roads Shipping Association is therefore bound by Judge Sand's decision through its membership in CONASA.

LETTER FROM THOMAS W. GLEASON

Hon. Robert G. Doumar
United States District Judge
January 3, 1985
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Upon remand to the Emergency Hearing Panel, the EHP deadlocked on the question of what effect the abstention had on the proceedings of June 12. Accordingly, pursuant to Judge Sand's decision and the EHP's own procedures, the abstention question was submitted to and independent arbitrator. On December 10, 1984 Mr. Arnold Zack, the arbitrator selected by the parties, issued his decision, finding that the abstention had the effect of carrying the vote in favor of the ILA and that the June 12 EHP decision was thus a final and enforceable award. A copy of Mr. Zack's decision is also enclosed.

Finally, on December 17, 1984 the ILA commenced a new action in the United States District Court for the Southern District of New York, No. 84 Civ. 9080, seeking to renew its petition to enforce the June 12 EHP award, in light of Mr. Zack's arbitral decision. Pursuant to Judge Sand's prior order, the new action has also been assigned to Judge Sand and is scheduled for hearing on Thursday, January 10, 1985. In the new action, the ILA has named as defendants all of the employer associations which are party to the Management-ILA Master Contract, including CONASA. Accordingly, a uniform decision should eventually be issued, binding upon all the ports. A copy of ILA's petition in the new case is also enclosed.

In affirming the preliminary injunction granted by Your Honor, the Fourth Circuit ruled that the validity of the EHP award can be considered in the New York action and as a result local arbitration of this matter is unnecessary. Accordingly, there would appear to be no need to proceed to trial of this case

LETTER FROM THOMAS W. GLEASON

Hon. Robert G. Doumar
United States District Judge
January 3, 1985
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at the present time. We respectfully request that the pretrial conference presently scheduled for February 1, 1985 be postponed.

Very truly yours,

THOMAS W. GLEASON

By: Charles R. Goldburg
Charles R. Goldburg

CRG/jam

cc: Braden Vandeventer, Esq.
Arthur Rutter, Esq.

APPENDIX B
ORDER OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

HAMPTON ROADS SHIPPING ASSOCIATION,

Plaintiff,

v. CIVIL ACTION NO. 84-500-N

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL-CIO), et al,

Defendants.

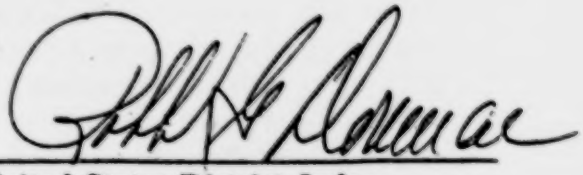
ORDER

On February 1, 1985 the parties in this matter appeared in chambers for a conference to discuss resolution of this case.

It appearing that the Southern District of New York and the Second Circuit Court of Appeals are actively considering issues interrelated with the instant matter, this Court ORDERS the parties to report July 31, 1985 on the status of the entire situation.

In any case, this matter shall be adjudicated in full by the end of this calendar year 1985, or sooner dismissed without prejudice should the parties desire.

IT IS SO ORDERED.



United States District Judge

At Norfolk, Virginia
February 6, 1985

APPENDIX C
PETITIONER'S MOTION FOR LEAVE TO AMEND AND SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

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HAMPTON ROADS SHIPPING ASSOCIATION,

Plaintiff,

v.

Civil Action
No. 84-500-N

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.

Defendants.

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MOTION FOR LEAVE TO AMEND AND SUMMARY JUDGMENT

Defendants by their attorneys, Breit, Rutter & Montagna and Thomas W. Gleason, hereby move the court for an order:

(i) pursuant to Rule 15 of the Federal Rules of Civil procedure granting defendants leave to serve an amended answer asserting the defenses of res judicata and collateral estoppel and also making certain minor revisions in the answer so as to accurately reflect subsequent events.

(ii) pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting summary judgment dismissing the complaint on the grounds of res judicata and collateral estoppel;

(iii) for such other and further relief as to the court may seem just and proper.

PETITIONER'S MOTION FOR LEAVE AMEND AND SUMMARY JUDGMENT

This motion is based upon all the exhibits annexed hereto and the accompanying memorandum of law.

Dated: February 26, 1985

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Thomas W. Gleason by CRG

THOMAS W. GLEASON
90 Broad Street
Suite 600
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(212) 425-3240

Attorneys for Defendants

CERTIFICATE OF SERVICE

CHARLES R. GOLDBURG hereby certifies that on February 26, 1985 he mailed a copy of defendant's motion for leave to amend and summary judgment to Vandeventer, Black, Meredith & Martin, 500 World Trade Center, Norfolk, VA 23510, counsel for plaintiff.

Charles Goldburg

CHARLES R. GOLDBURG

APPENDIX D
LETTER FROM THOMAS W. GLEASON

February 28, 1985

FEDERAL EXPRESS

Hon. Robert G. Doumar
United States District Judge
United States District Court
Eastern District of Virginia
Norfolk Division
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Re: Hampton Roads Shipping Association v.
International Longshoremen's Association
Civil Action No. 84-500-N

Dear Judge Doumar:

I am writing to advise Your Honor that by order dated February 28, 1985, Judge Sand of the United States District Court for the Southern District of New York granted a stay of his order confirming the EHP award, pending appeal to the United States Court of Appeals for the Second Circuit by Council of North Atlantic Shipping Associations and the other appellants. The appeal to the Second Circuit is scheduled to be argued on March 18, 1985.

Accordingly, the defendants would consent that their motion for summary judgment based on res judicata be held in abeyance until a ruling by the Second Circuit on the merits of

LETTER FROM THOMAS W. GLEASON

the appeal or the vacating of the stay, should it be vacated earlier.

Very truly yours,

THOMAS W. GLEASON

By: Charles Goldburg
Charles R. Goldburg

CRG:km

cc: Braden Vandeventer, Esq.
Arthur Rutter, Esq.